No. 85-2099

In The
Supreme Court of the United States
October Term, 1986

COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v

DOROTHY FINLEY,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

REPLY BRIEF FOR PETITIONER

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SUPPLEMENTAL ARGUMENT

The Judgment Below Does Not Rest On An Adequate And Independent State Ground.

The Pennsylvania Superior Court specifically held *Anders v. California,* 386 U.S. 738 (1967), applicable to this case (J.A. 24). Respondent and *amicus curiae* nevertheless contend that the judgment below rests on an adequate and independent state ground. This claim is meritless.

A state court decision is presumed to be based on federal grounds and, thus, within this Court's jurisdiction, if the "state court decision fairly appears to rest

primarily on federal law," or is "interwoven with the federal law," and "the adequacy and independence of any possible state ground is not clear from the face of the opinion." *Michigan v. Long,* 463 U.S. 1032, 1040-41 (1983).[1] Where a state court intends to use federal precedent "only for the purposes of guidance," it is free to make this clear by a "plain statement" in its opinion. *Id.* There is no such "plain statement" in the opinion below. Rather, the lower court's previously-noted reliance on *Anders* makes clear that its decision rests primarily—if not solely—on federal law.

Nor is the obvious reliance on *Anders* the only basis for dismissing respondent's jurisdictional challenge. The Pennsylvania Superior Court's few references to Pennsylvania cases are so interwoven with and clearly subsidiary to federal authority that this alternative criterion of *Long* is also met. In pertinent part, the opinion below noted that Pennsylvania law governing procedures for the withdrawal of appointed attorneys who see no basis for appeal are "derived from the seminal case of *Anders v. California,*" which was adopted in *Commonwealth v. Baker,* 429 Pa. 209, 239 A.2d 201 (1968) (J.A. 21, 22).

This Court has, of course, specifically stated that it will not examine state law to determine a state court decision's basis. *See Michigan v. Long,* 463 U.S. at 1040. Even such an examination, however, would undermine, not bolster, respondent's position. *Commonwealth v. Baker,*

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[1]The *Michigan v. Long* rule has been consistently applied to determine if an adequate and independent state ground exists. *See New York v. Class,* 106 S.Ct. 960, 964 (1986); *Caldwell v. Mississippi,* 105 S.Ct. 2633, 2638 (1985); *Ohio v. Johnson,* 467 U.S. 493, 497 n.7 (1984).

like all other relevant Pennsylvania cases, relies entirely on federal law and is without an independent state basis.[2]

Amicus curiae, the American Civil Liberties Union and the Civil Liberties Union of Pennsylvania, further erroneously rely on the Superior Court's statement—made after its finding that *Anders'* requirements had not been met—that "Pa.R.Crim.P. 1504, in affording counsel, means that counsel should act as an advocate in fulfilling his role." (J.A. at 24). Mere reference to a procedural rule does not create an adequate and independent state ground. Even where a state court decision mentions both federal constitutional law and state statutory law, this Court will infer reliance on the constitutional law since a court would not decide constitutional issues if statutory construction were sufficient to resolve the case. *See New York v. Class,* 106 S.Ct. 960, 964 (1986); *Richards v. Com., Unemp. Comp. Bd.,* 491 Pa. 162, 166 n.6, 420 A.2d 391 (1980).

Similarly baseless is respondent's contention that an adequate and independent state ground exists simply because the Pennsylvania Supreme Court's supervisory rules (Pa.R.Crim.P. 1503 and 1504) afford the right to counsel on collateral review. Those rules govern only when counsel must be appointed and do not address the circumstances under which counsel may withdraw. Thus, they are irrelevant to *Anders* and certainly do not support respondent's claim.

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[2]*Commonwealth ex rel. Cunningham v. Maroney,* 421 Pa. 157, 218 A.2d 811 (1966), which is the only Pennsylvania decision cited in *Baker* and is relied upon by *amicus curiae* (although only a "cf." cite), was concerned entirely with the *Douglas v. California,* 372 U.S. 353 (1963), right to counsel on direct appeal.

This case is properly before the Court for decision. The judgment below does not rest on an adequate and independent basis which defeats this Court's jurisdiction.

Respondent Was Not Prejudiced By Her Prior Counsel's Alleged Failure To Communicate With Her Or To Raise Certain Purportedly Meritorious Issues.

Respondent and *amicus curiae* additionally contend that the likelihood of flawed and ineffective performances by counsel appointed to represent indigents on collateral review will be substantially increased if this Court does not apply *Anders'* strict withdrawal procedures. They object particularly to counsel's putative lack of notice to respondent and argue that notice of an intention to withdraw is essential adequately to protect indigents on collateral review. Neither these nor any of their alternative contentions, however, support this Court's affirmance of the opinion below.

There is no federal constitutional right to counsel on collateral review (Brief for Petitioner at 21). States may, of course, choose—as does Pennsylvania—to provide counsel for such proceedings. *See Ross v. Moffitt,* 417 U.S. 600, 618 n.12 (1974). Such a voluntary act, however, should not require a jurisdiction to shoulder the additional burdens associated with *Anders.* Indeed, imposition of such obligations could have adverse and unfortunate consequences. The many states that now voluntarily and routinely provide appointed collateral review counsel would have the incentive no longer to provide such assistance.

This should not be permitted to occur. While *Anders* may be justified to protect an indigent's constitutional

right to counsel on direct appeal, its extension to protect a non-constitutional right to counsel is unnecessary. Post-*Anders* decisions of this Court make that clear.

Counsel, whether retained or appointed, are subject to the same ethical obligations. *See Polk County v. Dodson,* 454 U.S. 312, 323 (1981). These obligations include a duty to consult with the client and keep him informed of the case's important developments. *See Strickland v. Washington,* 466 U.S. 668, 688 (1984). *See also* A.B.A. Model Code of Professional Conduct 1.4 and Comment (duty of counsel to communicate and keep client reasonably informed of case's status). Further, it is this Court's considered view that counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland* at 690.

The foregoing authority contravenes *Anders'* extension which would necessarily assume that appointed attorneys provide less zealous and less effective representation than other counsel, and do not comply fully with their ethical obligations. Each state is best able to judge the quality of its *in forma pauperis* bar—with which it has now had much experience.[3] The states should be free to experiment, and the question of how the rights of indigents on collateral review should be protected is most appropriately left to them.

Strickland likewise undermines respondent's further assumption that she has been prejudiced by her former

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[3]*See Anders v. California,* 386 U.S. at 745 (Dissenting Opinion, Stewart, J., joined by Black and Harlan, JJ.) ("quixotic" requirements of *Anders* premised on an unjustified distrust for the *in forma pauperis* bar).

counsel's withdrawal. Prejudice because of an attorney's deficient performance is presumed in only rare instances. Absent a conflict of interest claim—an allegation not here made—ineffectiveness claims "are subject to a general requirement that the defendant affirmatively prove prejudice." *Strickland,* 466 U.S. at 692. Respondent cannot meet this burden with respect to counsel's alleged failure to give notice or otherwise.[4]

Here, appointed post-conviction counsel, after reviewing the transcript and meeting with his client, advised the state post-conviction judge of the nature of his record review and sought to withdraw since neither he nor his client could find any additional, non-frivolous and non-finally-litigated issues to raise. The letter making this request indicates on its face that a copy was sent to respondent

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[4]While recognizing that the "possible merits" of respondent's P.C.H.A. petition are now inappropriate for speculation, her counsel nevertheless apparently seeks to demonstrate prejudice by showing that arguable claims exist (Brief for Respondent, n.7 at 15). Even a cursory review of the record, however, substantiates their frivolity: (1) a more detailed, thorough and comprehensive jury trial waiver colloquy can hardly be imagined (N.T. 10/14/75, 6-36); (2) extensive testimony regarding the placement of a package in respondent's apartment closet was, in fact, permitted by the trial judge (N.T. 10/15/75, 98-110); (3) the trial judge specifically rejected any claim that the physical evidence was "the fruit of the poison tree" when he denied suppression of this evidence (Findings of Fact and Conclusions of Law, 10-11); (4) the Pennsylvania Supreme Court has held that defendants on collateral review cannot obtain relief based on the "merger" claim which respondent references. *Commonwealth v. Gillespie,* 516 A.2d 1180, 1183 (Pa. 1986). Further, no unspecified ineffectiveness claim is apparent from the record, and the sufficiency claim which respondent herself wishes to press is both finally litigated under Pennsylvania law (J.A. 6; 42 Pa.Cons.Stat.Ann. § 9544 (Purdon 1982)) and substantively meritless (Brief for Petitioner at 4-6).

(J.A. 9). Based on this endorsement, it can be fairly assumed that respondent in fact received the letter, and that counsel did what he may or may not have been obliged to do, *i.e.*, to notify her of his intention to withdraw.

Moreover, even assuming non-receipt, respondent's argument still fails for the simple reason that she was not prejudiced thereby. Counsel's no merit letter was not simply accepted below, as would have been appropriate. Instead, an independent judicial review of the record was conducted by the post-conviction judge (J.A. 14), followed by the appointment of new counsel on collateral appeal.

Finally, since Pennsylvania sets no limit on the number of post-conviction petitions that a convicted criminal can file, any alleged lack of notice affecting the dismissal of respondent's initial petition was without prejudicial effect. Respondent is not precluded from seeking further state collateral review by filing, under the state statutory scheme, yet another petition raising issues which are not finally litigated under Pennsylvania law.

—o—

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in petitioner's principal brief, it is respectfully requested that the order of the Pennsylvania Superior Court

be reversed and the case remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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